Thomas does not object to the consideration of the Petition For Writ of Certiorari on the typewritten record which has been certified, although he does not admit the truth of some of the statements made in the motion of petitioners to proceed in that manner. However, the paging and page numbers of the transcript of record as certified to the Supreme Court of the United States by the Clerk of the Supreme Court of Colorado do not appear on the original record or the copy thereof available in the Office of the Clerk of the Supreme Court of Colorado, and the detail of such paging and page numbers are available only in Washington, D. C. Consequently, of necessity, references here to pertinent portions of the record are by folio numbers which appear on the margin of the pages of the certified transcript of record, except that where actual page numbers of the certified transcript of record are known they are referred to. Such folio numbers appear on the copy of the record available in Colorado in the Office of the Clerk of the Supreme Court in Denver as well as on the record certified to the Supreme Court of the United States.

II.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A.

SUMMARY OF ARGUMENT

Statement of The Case

Points of Law

1. McMullin had adequate notice of the Amended Third Counterclaim and an adequate opportunity to be heard. Thus there is no violation of the Fourteenth Amendment to the United States Constitution.

2. McMullin's disclaimer of an interest in the mining claims is unimportant.
3. No constitutional question was promptly and aptly raised in the Supreme Court of Colorado.
4. There is no ground for the issuance of any Writ of Certiorari in respect of any judgment against Daniels and Hiskey even if there might be merit in McMullin's claim for such a Writ as to him.

Conclusion

B.

STATEMENT OF THE CASE

The Petition for Writ of Certiorari filed herein contains inadequate and misleading statements in respect of the matters before the court, and this additional statement is deemed essential.

In 1925 C. Sewell Thomas acquired title to certain unpatented mining claims from Daniels and Hiskey under an agreement (Folio 499-517). Pursuant to that agreement, in 1933 (Folio 518), Thomas reconveyed these claims to Daniels and Hiskey and thereafter had no further liability in connection with them (Folio 519-521), and had no interest in the property (Folio 1794-1868).

In 1942 Daniels conveyed a fractional interest in the property to Bentley M. McMullin (Folio 82), and McMullin in due course acquired a 1/3 interest in the property. Thereafter McMullin, Daniels and Hiskey completed work commenced by Thomas prior to 1933 for a United States patent, each of said persons owning an interest in the claims and paying 1/3 of the patent fees to the United States Government (Folio 395-99, 401-404,

1741-2, 1747-8, 1959, 2083, 2087-8), and they applied for a United States patent to be issued in the name of Thomas.

In 1947, shortly before the patent was to be issued, McMullin, acting for himself, Daniels and Hiskey, asked Thomas for a special warranty deed to the claims running to the three of them (Folio 523). Thomas stated that he would not give a warranty deed but that he would give a quit claim deed then, or after the patent issued (1866-70).

In due course the patent was issued in 1947 (Folio 2) in Thomas' name. Thereupon McMullin asked Thomas for a special warranty deed to Daniels and Hiskey. Thomas refused to give such warranty deed but again offered a quit claim deed to the property (Folio 641-3, 649, 683-70, 694-5). McMullin, who was spokesman for the group and a member thereof and attorney for Daniels and Hiskey, refused to accept the quit claim deed and continued to demand a special warranty deed. Shortly thereafter in 1948 Daniels and Hiskey alone, acting by McMullin as their attorney and without joining McMullin as a party to the case, brought this action in the District Court of the State of Colorado (Folio 1-10) against Thomas alleging he was a resulting trustee for Daniels and Hiskey and demanding a warranty deed. McMullin actively and vigorously participated, however, in every phase of the resulting litigation in all courts and was and is fully familiar with the litigation in every respect.

Thomas, being faced with an unfounded claim against him, as trustee moved for leave to file (Folio 313-319), and, pursuant to leave of court (Folio 422-428), on November 16, 1948, filed an Amended Counterclaim (Folio 321-350) in the nature of an equitable bill for instructions against plaintiffs and McMullin, naming McMullin specifically (Folio 337-8, 344), in which Thomas asked that McMullin be made a party (Folio 347), sought instructions to himself as trustee as to what persons and in what

manner he should convey whatever title he might have (Folio 349), sought a decree that his costs and expenses, including attorneys' fees, in connection with the proceeding and the obtaining of instructions referred to, be allowed to him out of the property which was the subject matter of the case (Folio 349-50) and, contrary to the statement on Page 20 of the of the Petition for Writ of Certiorari, sought such other and further relief as to the court might seem proper (Folio 350).

McMullin was made a party to the Amended Counterclaim as an involuntary plaintiff (Folio 424) by Court order, and on November 27, 1948, accepted service of summons together with a copy of the Amended Counterclaim and the Complaint in the case (Folio 429-30). Contrary to the statement in the Petition for Writ of Certiorari (Page 21), the Summons specifically referred to "Other and further relief" sought in the Counterclaim (Folio 722). At all times thereafter McMullin was a party to the case so far as the disposition of the Amended Counterclaim was concerned.

Thereafter on January 21, 1950, after McMullin had filed a Disclaimer of any interest in the property (Folio 1193-6), a court order was entered with the consent of all parties, including McMullin, acting as attorney and for himself. It instructed Thomas to give a quit claim deed to Daniels and Hiskey (Folio 1331-39, Page 71, Colorado Supreme Court Brief of plaintiffs, United States Supreme Court Record Page 992), the exact deed which Thomas had offered prior to the commencement of the action. Thomas gave such a deed and it was accepted (Folio 1366). This order specifically reserved to the court jurisdiction to pass upon plaintiffs' Complaint and to determine the right of Thomas to be reimbursed for his costs and expenses in accordance with the Amended Third Counterclaim, and reserved the question of court costs and the taxing thereof.

The court did not dismiss the Counterclaim as to McMullin. It remained pending as to him and Daniels and Hiskey on the reserved issues. The issue of liability of Daniels, Hiskey and McMullin for costs and expenses remained undisposed of. The statement on Page 22 of the Petition for Writ of Certiorari herein that no issue as to McMullin remained is incorrect.

In due course Thomas filed a Motion for Summary Judgment directed to the Complaint only (Folio 518-20). This Motion was sustained and the Complaint dismissed (Folio 1559-62).

Thereafter the Amended Counterclaim came on for trial on the issues as to which the court had reserved jurisdiction. McMullin was present throughout the trial, cross-examined witnesses (Folio 1799, 1853, 1939) and participated in the argument (Folio 2126-29). His presence was not limited to any capacity as attorney for Daniels and Hiskey. All through his opening statement he referred to himself, Daniels and Hiskey as "we" (Folio 1744-8). There was no question but that he was representing his own interests as well as those of his clients, and the statement on Page 22 of the Petition for Writ of Certiorari herein that he appeared only as attorney is not supported by the record.

At the conclusion of the trial, the court held that Thomas had been forced to seek instructions as to how he should perform his duties as trustee, that he had been forced into unnecessary litigation and that he was entitled to recover his costs and expenses from the beneficiaries of the trust who forced him into such unnecessary litigation, that such costs and expenses of the trustee were $2500, and rendered judgment against Daniels and Hiskey and McMullin for that amount, plus costs (Folio 2134-2151, Pages 80-87 Colorado Supreme Court Brief of Plaintiffs, Page 992 United States Supreme Court Record). Evidence

given at the trial was not confined to Daniels and Hiskey and related as much to McMullin as to Daniels and Hiskey because everything that was done by Daniels and Hiskey was done by McMullin, and Daniels and Hiskey acted only through McMullin. The statements on Page 22 of the Petition for Writ of Certiorari that no evidence was offered against McMullin, that no claim was made against him and that the opening statements related solely to a claim against Daniels and Hiskey are not supported by the record. In fact the opening statement of Kenneth Robinson, an attorney for Thomas, is directed to a considerable extent to McMullin and McMullin's activities. (Folio 1718-25.)

C.

POINTS OF LAW

1. McMullin had adequate notice of the Amended Third Counterclaim and an adequate opportunity to be heard. Thus there is no violation of the Fourteenth Amendment to the United States Constitution.

McMullin was a party to the Amended Counterclaim. He had adequate notice thereof and of the trial thereon and he was present at and participated to the fullest in the trial. He acknowledged service of the Counterclaim and of Summons directed to it. Thus he was apprised of the pendency of the action against him and afforded every opportunity to present his defense thereto. This satisfies the requirements of the Fourteenth Amendment of the United States Constitution for notice and opportunity to be heard.

Milliken vs. Meyer, 311 U. S. 457;

Mullane vs. Central Hanover Trust Company, 339 U. S. 306;

Standard Oil Company vs. Missouri, 224 U. S. 270.

McMullin's claim that the Summons and copy of the Complaint which were served on him did not give him adequate notice that a claim was made against him for a personal judgment is wholly wrong. The prayer of the Complaint specifically asked "for such other and further relief as to the court might seem proper" and, the Amended Counterclaim being a traditional equity proceeding, the court could grant whatever relief which may be justified by the facts and against any party. This rule is confirmed by Rule 54(c) of the Colorado Rules of Civil Procedure providing as follows:

> "Judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled even if the party has not demanded such relief in his pleadings."

Furthermore, the Supreme Court of the United States clearly held in *Standard Oil Company vs. Missouri* (Supra) that the prayer of a complaint does not constitute part of the notice guaranteed by the Fourteenth Amendment to the Constitution and that the court may grant other and different relief from that prayed for so long as the relief granted is appropriate to the claim for relief presented by the complaint and the evidence taken under it. The testimony introduced in the trial on the Amended Counterclaim in the presence of McMullin bearing on McMullin's activities and responsibility for the unnecessary litigation was not objected to by McMullin. Even if it could be established that the allegations of the Amended Counterclaim were deficient in any respect, Rule 15(b) of the Colorado Rules of Civil Procedure providing as follows:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they

shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and raise these issues may be made upon motion of any party at any time, even after the judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

forecloses any claim that the issues were not raised at the trial.

Well reasoned decisions authorize the granting of a personal judgment against beneficiaries of a trust for costs and expenses incurred by a trustee in conducting unnecessary litigation which the beneficiaries have caused.

Re Atwood's Trust, 277 Minn. 495; 35 NW 2d 736;

Wilson vs. Whitehead, 181 Virg. 960; 27 SE 2d 213.

The affirmance of the judgment of the District by the Supreme Court of Colorado in this case adopts such a rule for Colorado and is a matter purely of local law.

Standard Oil Company vs. Missouri (Supra).

McMullin urges that he did not participate in the trial on the counterclaim on his own behalf but simply as an attorney. That is not so, but is relatively unimportant. He had notice of the pleadings and of the trial and was a party against whom relief was sought and even

if, although he was physically present and an active part
pant of the trial, he considered himself as not there as
individual, he is bound by any judgment rendered. If
was not individually there or did not see fit to particip
in his own capacity, he can hardly complain of what
court did. The case of *Rude vs. Buchhalter*, 286 U. S. 4
cited in the Petition of Certiorari involved no Consti
tional question, the problem involved being error of
Court of Appeals in going beyond the issues presented
the record taken in the District Court.

**2. McMullin's Disclaimer of an Interest in The Mining Cla
is Unimportant.**

The fact that McMullin filed a disclaimer of an inter
in the mining claims is unimportant. McMullin's cla
that as a result of his disclaimer he ceased to be a pa
to the counterclaim when the court ordered Thomas to g
a quit claim deed and found McMullin had no interest
the mining claims is wholly incorrect. The order did
dismiss the case as to McMullin. He remained a party.
Disclaimer of January 14, 1950, was simply a stateme
by him that he had no interest in the property. Of cour
that was contrary to the fact and to his position consisten
taken even at the trial of the Amended Counterclaim that
had such an interest. Nevertheless based on that D
claimer the court in instructing Thomas to act could ord
a deed to Daniels and Hiskey, and exclude McMullin as
grantee in the deed, without leaving McMullin with a cla
that the deed was wrongly directed. McMullin apparen
was willing to look to his clients to recognize his rig
after they received the deed, to the extent that any su
recognition by them was necessary. If McMullin want
it that way no one could legitimately object so long as
was a party and bound by the order. No rule of Colora
Procedure and no authority is cited by McMullin to
effect that a Disclaimer of an interest in the property,

an order based on such Disclaimer, dismisses the case as to McMullin or results in the person disclaiming being no longer a party to the action. Of course, he continued to be a party to the action and was bound by any final judgment which may thereafter be entered.

McMullin argues that when he was made a party the court indicated if he filed a Disclaimer "without more," he would not be liable for costs. The court did so indicate informally but without making any decision to that effect. However, the court was speaking of court costs which are taxable as such. The $2,500 judgment was not an allowance of costs. The judgment was for $2,500, and for costs. Furthermore, McMullin did not file a Disclaimer "without more." After he was made a party he moved personally for a change of venue (Folio 432-5) on November 27, 1948, which was denied (Folio 560), and then he moved for a dismissal of the case as to him on December 24, 1948, which motion was never acted upon.

Any federal question involved, therefore, has already been decided by the Supreme Court of the United States and the decision of that question by the Colorado Court is in accord with the applicable decisions of the Supreme Court of the United States. Consequently, under Rule 38 of the United States Supreme Court no Writ of Certiorari should be issued.

3. No Constitutional Question Was Promptly and Aptly Raised in the Supreme Court of Colorado.

The Colorado Rules of Civil Procedure 111(f) cited at Page 11 of the Petition for Writ of Certiorari herein provide that the points presented to the Supreme Court of Colorado must be clearly and briefly stated in summary of argument. The alleged point on which petitioners rely is simply the point quoted on Page 13 of the Petition for Writ of Certiorari herein that "the judgment against Mc-

Mullin was erroneous because no claim for a money judgment was ever made against him." No reference appears to the Constitution of the United States. Under the rule of *Oxley Stave Company vs. Butler County*, 166 U. S. 648, such a statement does not "specially set up or claim" a right privilege or immunity under the Constitution of the United States as required by Title 28, U. S. Code Annotated, Section 1257(3). Neither is it a clear statement of any legal proposition based on the Constitution of the United States claimed as a ground for reversal of the judgment.

Previous to the Amendments of the Colorado Rules of Civil Procedure referred to on Page 11 of the Petition for Writ of Certiorari herein the Colorado Rules had required a specification of points, assignments of errors and a summary of argument. The 1953 Amendment to the Rule obviously was calculated to combine these three documents aimed at the same purpose, into one document. It is inconceivable that the Supreme Court of Colorado in adopting the Amended Rule created a situation in which the Court would be kept in the dark until the last page of a reply brief was filed to know what legal points were relied on by a plaintiff in error. Even if it did, the only reference to the Fourteenth Amendment in the argument with the Supreme Court of Colorado appears at Page 31 of the Reply Brief of Plaintiffs in Error before the Colorado Supreme Court (Page 994, Record before United States Supreme Court) where an argumentative statement based on a hypothetical situation not supported by the record, is made to the Supreme Court of Colorado, and not even there is there a specific claim made that any specific party in this action was deprived of any Constitutional rights.

4. There is no ground for the issuance of any Writ of Certiorari in respect of any judgment against Daniels and Hiskey, even if there might be merit in McMullin's claim for such a Writ as to him.

The defect in the judgment which McMullin claims exists as to him has no application to Daniels and Hiskey. No claim is made by them that they did not have adequate notice and opportunity to be heard in respect of the Amended Counterclaim within the Fourteenth Amendment to the Constitution. Certainly if the counterclaim did not give adequate notice to McMullin of a claim for a personal judgment against him, it could be similarly argued that it did not give adequate notice to Daniels and Hiskey of a claim for a personal judgment against them. The absence of such a claim by Daniels and Hiskey emphatically indicates that there is no substance to McMullin's claim.

Furthermore, even if the judgment could be set aside as to McMullin, there is no basis for setting it aside as to Daniels and Hiskey. Daniels and Hiskey seek refuge in an ancient common law rule that if a judgment is not valid as to one defendant, it is not valid as to all defendants. This court has refused to follow that principle. *James Dickinson Company vs. Harry*, 273 U. S. 19. Furthermore, to sustain such argument, even under that principle, McMullin must show, among other things, that he was a party to the case at the time the judgment was rendered, and if he was a party to the case, there is no question but that he had adequate notice and opportunity to be heard. If he was in fact not a party to the case when the judgment was rendered, even under the ancient law the judgment, if set aside as to him, would stand as to Daniels and Hiskey.

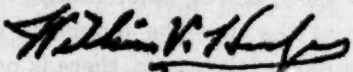
The most recent application of the Rule in Colorado sets aside a judgment against one of three defendants to a tort claim arising out of an automobile accident without affecting the other defendants and sustains the judgment as to the other two.

C. A. Jackson, Inc. vs. Wilhelm, 106 Colo. 140; 102 Pac 2d 731.

D.

CONCLUSION

It is submitted that there is no substantial ground stated in the Petition for Writ of Certiorari as to why Daniels, Hiskey or McMullin have been deprived of any right, privilege or immunity under the Constitution of the United States nor is any such question raised in a way to bring it properly before the Supreme Court of the United States. The services in payment for which the judgment was rendered were caused by McMullin's useless moves in carrying on unnecessary litigation. The Colorado Court had jurisdiction over McMullin as a party, and of the cause. Its judgment was the result of powers confirmed by local laws and rules of procedure. The Petition for Writ of Certiorari is simply a further effort on the part of Daniels, Hiskey and McMullin to harass Thomas because he failed to meet their unfounded demands against him, and to cause him further litigation expense. It is submitted that the Writ of Certiorari should be denied.



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